IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1973

No. 73-631

HOWARD JOHNSON COMPANY, INC.,

Petitioner

v

DETROIT LOCAL JOINT EXECUTIVE BOARD, HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION, AFL-CIO,

Respondent

On Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

MOTION FOR LEAVE TO FILE A SUPPLEMENTAL BRIEF AND SUPPLEMENTAL BRIEF FOR PETITIONER

Pursuant to Rule 41(5) and (6) of the Supreme Court of the United States Revised Rules, Petitioner Howard Johnson Company, Inc., hereby moves for leave to file the accompanying brief presenting and discussing "late authorities. . .that were not available in time to have been included in [its] brief in chief".

In support of this motion, Petitioner shows as follows:

1. Petitioner's brief in chief was filed January 28, 1974. Petitioner's reply brief was filed March 14, 1974. This cause was argued on March 19 and 20, 1974.

2. On April 1, 1974, the decision in *Teamsters, Local 249* v *Bill's Trucking, Inc.*, _____ F2d _____, 85 LRRM 2713 (3rd Cir., March 13, 1974) was first unofficially reported. On or about May 1, 1974, the decision in *Steelworkers* v *U.S. Gypsum Co.*, _____ F2d _____, 85 LRRM 2962 (5th Cir., April 11, 1974) was first unofficially reported.

3. On April 9, 1974, a motion for leave to file a supplemental brief referring to and discussing *Bill's Trucking* was filed by Respondent and on April 22, 1974, such motion was granted by this Court.

4. Although Petitioner is advised that counsel for Respondent mailed to Petitioner's counsel copies of said motion and brief, such copies were not received and the first time Petitioner's counsel became aware of such filing was upon receipt on April 24, 1974, of a letter from the Clerk of the Court advising that the motion was granted and the brief received.

5. Therefore, Petitioner requests leave to file the attached supplemental brief.

CONCLUSION

For the above-stated reasons, this motion for leave to file a supplemental brief should be granted.

Respectfully submitted,

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SUPPLEMENTAL BRIEF FOR PETITIONER

Respondent has hastened to call to the attention of this Court a decision of the Court of Appeals for the Third Circuit in Teamsters, Local *249* v *Bills Trucking*, Inc.,____ F2d____, 85 LRRM 2913 (March 13, 1974). The case is substantially different from this case, but dicta in the opinion of the court apparently is deemed by Respondent to be worthy of consideration by this Court. Still another Court of Appeals, the Fifth Circuit, has now rendered a decision in the gray area left by this Court's decisions in *John Wiley & Sons* v *Livingston*,[1] and *NLRB* v *Burns International Security Services, Inc.*[2] In *Steelworkers* v *U.S. Gypsum Company*,____F2d____, 85 LRRM 2962 (April 11, 1974), the Fifth Circuit has enforced an arbitrator's decision, applying parts of a prior employer's collective bargaining contract to a successor employer.

The two cases will be discussed below.

Bill's Trucking

Initially it should be noted that *Bill's Trucking* involved a review of a lower court's decision granting the defendant employer's motion for summary judgment. Thus, the facts in the union's complaint were viewed in the light most favorable to the plaintiff union.

Factually, *Bill's Trucking* involved a sale of capital stock from one individual to another. Prior to the stock transfer, the corporation had a labor agreement with the plaintiff union. The Court of Appeals concluded that, based on the union's complaint, the employer involved "was in reality the same corporation with which the union had a contract",[3] and that the employer dismissed its employees either on the day the transfer of stock took place or the next day. The union sued solely for damages occasioned by an alleged breach of the labor agreement, which did not contain a provision for arbitration. The Third Circuit reviewed the lower court's decision granting summary judgment and remanded the case for a factual hearing.

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[1] 376 U.S. 543 (1964).

[2] 406 U.S. 292 (1972).

[3] 85 LRRM at 2718.

Unlike the present case, there was a factual dispute as to whether or not the employees had been retained in employment after the transfer of ownership. Unlike this case, the corporate employer remained unchanged, although stock ownership changed, and at a later date the name of the corporation was changed. Unlike this case, the union sought damages for breach of the contract rather than submission to an arbitrator of the question whether some of the provisions of the contract should be deemed to continue in effect, binding on a new employer.

In rendering its decision, the Third Circuit was confronted with this Court's decisions in *John Wiley & Sons* v *Livingston* and *NLRB* v *Burns International Security Services, Inc.* It elected to restrict *Burns* and read into *Wiley* unjustified implications. In so doing, the Third Circuit based its decision on several untenable conclusions.

The Third Circuit stated in its opinion that *Wiley* justified the district court's picking and choosing which terms of the labor agreement it would enforce.[4] Yet, this Court in *Wiley* made no such determination, but limited its decision to a holding that a federal court could order enforcement of the arbitration clause. In fact, as pointed out in footnote 21 of the Amicus Brief filed by the Chamber of Commerce in this case, this Court in *Wiley* refused to adopt such a determination.[5]

The Third Circuit appears to place reliance on the theory that national labor policy as expressed in Section 8(d) of the National Labor Relations Act, 29 U.S.C. §151 *et seq.*, constrains only the National Labor Relations Board and does not reflect a legislative endorsement uniformly applicable to the Board and the federal courts. Yet, the Third Circuit grudgingly recognized that the policy of freedom of contract embodied in Section 8(d) has a broader scope than mere application to the Board. The Third Circuit's mistaken assumption about the breadth of Section 8(d) has been treated in Petitioner's earlier briefs.

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[4] See footnote 26 of the Third Circuit's decision.

[5] It is important to note that as recently as the *Burns* decision, this Court specifically stated that *Wiley* "held only that the agreement to arbitrate ... survived the merger ... ." 406 U.S. at 286.

To justify its expansive interpretation of *Wiley*, the Third Circuit characterized this Court's *Burns* decision as "exceedingly narrow". Yet, it was the *Wiley* decision which this Court in *Burns* held was a "limited accommodation" between freedom of contract and judicial preference of arbitration, and *Burns* spoke of *Wiley* as a narrow holding. 406 U.S. at 286. Moreover, this Court's statements in *Burns* relative to *Wiley's* limited impact are contained in that portion of Justice White's opinion wherein this Court specifically stated:

> Holding either the union or the new employer bound to the substantive terms of an old collective bargaining contract may result in serious inequities. 406 U.S. at 287.

The policy considerations discussed in *Burns* may not be applicable in *Bill's Trucking* if the same employer and the same employees were involved after transfer of stock ownership - a factual determination still to be made - but the dicta of the Third Circuit as to the meaning of *Wiley* and *Burns* is erroneous.

In its decision, the Third Circuit failed to address the issue of employee majority status. This failure may be warranted should it be determined on remand that the same employer was at all times involved. However, its failure to direct the District Court to determine employee majority status in deciding successorship is contrary to the decision of this Court in *Burns* and other decisions cited in Petitioner's briefs, and reflects a fundamental misunderstanding of the successorship concept.

Nearly all of *Bill's Trucking* that would be pertinent to this case is mere dicta, for the Third Circuit only remanded the case for a factual hearing to determine whether the same employer was involved, the status of employees, and the continuity of the business. But the dicta in *Bill's Trucking* demonstrates the difficulties engendered for federal courts when they fail to heed this Court's repeated statements that *Wiley* is a carefully circumscribed decision which does not run counter to Section 8(d) and the national

labor policy expressed therein.[6] The Third Circuit says it narrowly construed the *Burns* holding that the collective bargaining agreement does not survive an actual change in employers. If the Third Circuit is telling the District Court that it can make a contract for a successor employer by finding that "all, some, or none" of the labor contract provisions apply, and then award damages for breach of such provisions, it is ignoring *Burns* altogether.

U. S. Gypsum

The *Gypsum* case commenced in 1965 when Gypsum acquired the plant and a substantial part of the assets of another company. Gypsum engaged in operations identical to those of the seller, and to this end hired substantially all of the former employees and supervisors. The union which formerly represented the employees and was a party to a collective bargaining contract with the seller demanded recognition and application of the agreement. Upon Gypsum's refusal to recognize either the union or the agreement, the union brought suit under § 185 to compel arbitration of certain grievances and filed a § 158 (a) (5) charge with the Board alleging refusal to bargain.[7] Simultaneously, Gypsum filed a decertification petition with the Board, which ordered an election

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[6] The Third Circuit attempted to justify its position on alleged implications drawn from *Wiley*:

> Though the holding in *Wiley* was necessarily limited to establishing the successor's contractual duty to arbitrate, the case, as a practical matter, implies more. This is manifest from the fact that the very question upon which the successor must, under *Wiley*, submit to arbitration, is the extent to which the *other* terms of the predecessor's contract are binding on the successor. 85 LRRM at 2716.

Yet, this Court in *Burns* specifically rejected any such implications arising from *Wiley* which would permit the imposition of labor agreements.

[7] This charge was subsequently withdrawn when the union decided to seek contract enforcement rather than obtain a bargaining order. During arbitration, counsel for the union clearly recognized the forum - shopping involved:

> Of course, we wished and preferred to have our contract in effect rather than to get an order to bargain from the Board because in our contract, as I commented a moment ago, we had a checkoff provision. And if we could have succeeded in having our contract and our arrangements enforced by the Court's order, it was preferable to use rather than to have the Board's order . . . 85 LRRM at 2964.

despite the union's claim of contract bar.[8] Notwithstanding the Board proceedings, the Fifth Circuit ordered arbitration, predicating its decision on *Wiley*.[9] Thus under the Board's standard, the union was required to put its claim to representation to a vote,[10] while under the Court's standard, the union was allowed to enforce its contract.

In the arbitration proceeding, the arbitrator found that the recognition and dues check-off clauses in the collective bargaining agreement were applicable to the successor employer during the period commencing with the time the successor employer began operations and terminating when the union was decertified. The arbitrator also found that the company had breached a provision of the collective bargaining agreement which provided for re-opening the contract for negotiation as to a wage increase in the third year of the contract, and held that the employer was obligated to pay an increase which the arbitrator decided would have been agreed upon if the employer had negotiated as obligated by the contract.

The employer refused to abide by the arbitrator's decision, and new legal proceedings were commenced in United States District Court for enforcement of the arbitrator's award. After a court order enforcing the award in part, the matter was again heard by the Court of Appeals.[11] The Court now holds that the arbitrator was authorized, on the basis of *Wiley*, to find that parts of the collective bargaining agreement were applicable to the successor employer and that it had breached such contract obligations. It, therefore, enforces the arbitrator's award in total, although remanding the case to the district court for a determination as to an award of attorneys' fees to the union.

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[8] The Board deemed it unnecessary to decide the continuing viability of the contract, finding the purposes of the Act (e.g., protection of majority choice) best effectuated by ordering an election.

[9] *U. S. Gypsum Co.* v *Steelworkers*, 384 F2d 38 (5th Cir., 1967) cert. den. 389 U. S. 1042 (1968).

[10] The union lost the election and was decertified.

[11] The length of this legal battle from its inception in 1965 until 1974 illustrates that suit under §185 does not, in successorship cases, afford a means for expeditious resolution of labor disputes, contrary to the claims of Respondent.

Gypsum does not involve one of the central issues in the instant case. Gypsum was admittedly a successor employer, since it had purchased a substantial part of the assets of the predecessor employer, continued the same business, *and employed the same employees, including supervisors.* Indeed, the earlier decision in the case was cited by Petitioner as one of the large number of cases which establish that it is a condition precedent to finding successorship that a majority of a new owner's work force consist of employees of the former owner. Since Petitioner, exercising its right to determine its work force, hired none of the former owner's employees in one of the bargaining units involved and a minority of the employees in the other bargaining unit, it should not be found to be a successor.

On a second issue presented in this case (one which need not be reached if it is found that Petitioner is not a successor), the decision of the Fifth Circuit, rationalizing *Wiley* and *Burns*, is more troublesome. The Fifth Circuit holds that despite *Burns'* conclusion that the collective bargaining agreement does not continue in effect after a change of employers, the arbitrator could enforce against the successor provisions of the contract of the predecessor. However, the Court was clearly troubled by this conclusion, for it stated:

> Reading the Burns opinion as a whole could justifiably leave one with the conviction that it presages a similar holding to the effect that an arbitrator, operating within the same basic framework of national labor policy as the board, does not generally have the power to bind a successor to substantive provisions of a collective bargaining agreement to which it is not a party. We decline, however, to adopt that position at this juncture. 85 LRRM at 2970, 71.

In its footnote 20, the Court states:

> After an exhaustive analysis of the doctrine of successorship, both in board cases and § 301 cases, one commentator concludes as follows: "By reading Wiley and Burns together and giving vitality to each, the conclusion seems inescapable that the substantive terms of the contract survive, whether by decision of the arbitrator or the NLRB, only if

> the successor in word or deed manifests an intent to be bound thereby." Slicker, supra, note 17 at 1102; accord Pate, supra, note 17, at 693. Contra, Note; supra, note 17, at 577; The Supreme Court, 1971 Term, supra, note 17, at 256.

It then continues with a statement by Dean St. Antoine:

> On still a deeper level, Burns reflects a clash between certain fundamental values in the labor field. On the one hand, there is a concern about protecting employees against a sudden and unforeseen loss of bargaining and contract rights. There is also a concern about maintaining industrial stability and labor peace, through reducing the number of representation elections and sustaining the life of labor agreements. On the other hand, stress is laid on the freedom and voluntariness of the collective bargaining process, on the importance of saddling neither unions nor employers with substantive contract terms to which they have not agreed. Stress is further laid on providing maximum flexibility in business arrangements, so that employers may respond to changing market conditions without being straitjacketed by the bargaining or contractual obligations that may have been assumed by imprudent predecessors. *The future development of successorship law undoubtedly depends far more on the way the members of the Supreme Court ultimately balance out these competing values than on any logical deductions from Wiley and Burns.* (emphasis in original). 6 Mich. J. L. Ref. 269,277.

The Fifth Circuit should indeed be troubled, for its decision cannot be reconciled with the unanimous result of this Court in *Burns* nor with the policies expressed by Mr. Justice White.

The dichotomy discussed at length in Petitioner's brief will continue to exist if in cases coming from NLRB it is held, as in *Burns*, that the contract does not continue in effect, but in cases coming from the courts it is held, as in *Gypsum*, that an arbitrator can apply and enforce provisions of the contract, and in cases such as *Bill's Trucking*, a U.S. District Court, lacking the flexibility and expertise of an arbitrator, can determine which contract provisions are applicable and award damages for breach of such provisions. A uniform rule should apply, and it should be the rule enunciated by this court in *Burns*.

CONCLUSION

The decision of the court below should be reversed.

Respectfully submitted,

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